IN THE

Supreme Court of the United States

NO. 77-207

DARLENE RUTH BOWMAN,
Petitioner

v.

PHYLLIS BOWMAN SIMPSON,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This is a controversy between Phyllis Bowman Simpson, daughter of Fred E. Bowman, deceased, and her step-mother, Darlene Ruth Bowman, over the character of funds deposited by Fred and Darlene Bowman in a federal credit union in Houston, Texas.

QUESTION PRESENTED

The question presented is whether the provision of the Federal Credit Union Act which permits members to hold shares as joint tenants with a right of survivorship supersedes Texas Constitutional Law which prohibits community property from being jointly held with a right of survivorship.

ARGUMENT

THE TEXAS SUPREME COURT PROPERLY REFUSED PETITIONER'S APPLICATION FOR WRIT OF ERROR, AND AFFIRMED THE JUDGMENTS OF THE TRIAL COURT AND THE NINTH COURT OF CIVIL APPEALS.

A. Texas law prohibits the creation of a joint tenancy with right of survivorship out of community property.

It is clear and undisputed that in Texas, community property cannot be the subject of joint ownership with a right of survivorship. *Williams v. McKnight*, 402 S.W.2d 505 (Tex. Sup. 1966); *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961).

This principle of Texas law is not merely legislative, but constitutional. The character of property owned or acquired during marriage is determined by the Texas Constitution, and spouses cannot by mere agreement change the character and nature of the rights and interests in property owned or acquired by them from that prescribed by law. *Hilley*, at 568. This is not just a footnote to Texas community property law. It is an integral part of the fabric of the community property system, and the "mere agreement" of Fred and Darlene Bowman when they deposited funds in the credit union should not be permitted to emasculate the structure of community property law in Texas.

The agreement signed by Fred and Darlene Bowman was virtually identical to survivorship agreements routinely executed in every bank, savings and loan, and state chartered credit union in Texas. Petitioner agrees

that in each of these other cases, the agreement would be invalid. This tenet of Texas constitutional law is not voided simply because the credit union, an association of individuals, was organized pursuant to a federal statute.

B. The Federal Credit Union Act does not supersede Texas Constitutional Law.

Petitioner argues that the constitutional law of Texas should be disregarded in this case, because a Federal Statute, 12 U.S.C.A. § 1759, permits federal credit union accounts to be established in the form of a joint tenancy with right of survivorship.

Respondent urges that this provision was not intended to and does not supersede Texas law of community property. In fact, the opposite result was intended; the provision was designed to place federal credit unions in a position of equality with local banking institutions, equally subject to the state constitutional requirements of community property.

Petitioner's only authority is the case of *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), on which she relies to support her contention that the constitutional requirements of Texas community property law should be disregarded. In *Free*, a husband and wife jointly held United States Savings Bonds. A Treasury Regulation mandated that when bonds were so held, a right of survivorship was created. This Honorable Court held that the state law of community property must yield to the mandate of the Treasury regulation.

The principle behind this Court's decision in *Free* is unique to the issuance and ownership of United States Savings Bonds, and is not applicable to this case.

The power to borrow money is specifically delegated to the Federal Government by the United States Constitution:

> Article I, Section 8, Clause 2, of the Constitution delegated to the Federal Government the power "to borrow money on the credit of the United States." Pursuant to this grant of power, the Congress authorized the Secretary of Treasury with the approval of the President, to issue savings bonds in such form and under such conditions as he may from time to time prescribe . . . *Free*, 369 U.S. at 666.

Pursuant to this power, the Treasury made the survivorship clause an integral part of the borrowing system, as an inducement for the purchase of savings bonds:

> The success of the management of the national debt depends to a significant measure upon the success of the sales of the savings bonds. The Treasury is authorized to make the bonds attractive to savers and investors. One of the inducements selected by the Treasury is the survivorship provision, a convenient method of avoding complicated probate proceedings. *Free*, 369 U.S. at 669.

The survivorship provision governing ownership of savings bonds prevails over State law because it is an integral part of the exercise of federal power, and directly affects the interests of the Federal Government, the borrower. In our case, a joint deposit between two individuals in a federal credit union is a purely private transaction between two Texas residents, and in no way affects the interests of the Federal Government. This critical distinction was recognized by this Court in *Bank of America National Trust and Savings Association v. Parnell,* 352 U.S. 29, 77 S.Ct.

119, 1 L.Ed.2d 193 (1956). In *Parnell*, the issue was whether Federal or State law ought to apply in an action between private persons for conversion of government bonds. This Court held that State law applied:

> The present litigation is *purely between private parties*, and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular state regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of Federal law to transactions essentially of local concern. *Parnell*, 352 U.S. at 33. [Emphasis added]

This Court in *Free* distinguished *Parnell*, recognizing that state law will control in cases where the litigation is between two private parties and does not "intrude upon the rights and duties of the United States." *Free*, 369 U.S. at 669.

The present case is a controversy between two private individuals, and in no way directly involves the rights, duties, or interest of the United States. In this situation, as this Court has held in *Parnell* and recognized in *Free*, state law controls.

The Ninth Court of Civil Appeals and the Texas Supreme Court recognized this distinction. Petitioner ignores the significance of the distinction, asserting that *Free v. Bland* and this case are "strikingly similar". (Petitioner's Application, p. 5). Petitioner fails to understand the distinction and its importance.

The transaction at issue in *Free v. Bland* was between the Federal Government, the debtor, and Mr. and Mrs. Free, the creditors. The survivorship provision of that contract was a necessary element of the Government's power and duty to manage its debt structure.

The transaction at issue in the instant case is between two private individuals, both Texas residents, who simply agreed between themselves to hold their community property as joint tenants with a right of survivorship, an agreement which is void under Texas law. Their decision to place their property into an account in a federal credit union does not change the result. The credit union is not the federal government, but merely a group of private individuals permitted by federal law to form a credit association for the furtherance of their own interests. The interests of the federal government are not involved, and state law controls.

The question presented in this case has been previously considered and decided by the Supreme Court of Maine, in *DiPierro v. Dudley*, 317 A.2d 824 (Me. 1974). The opinion in *DiPierro* contains an excellent discussion of the origin of the survivorship provision in question, its legislative history, its purpose, and its relation to state law.

In *DiPierro*, funds had been held in a joint account at a federal credit union by deceased and his niece. Upon his death, the niece claimed the proceeds pursuant to the survivorship provision in question. The executrix of the estate of the deceased sued the niece to recover the proceeds, relying on a Maine statute which prohibited survivorship accounts between persons so related. The question presented, as in the instant case, was whether

the local statute applied, rendering the survivorship clause ineffective, or whether federal law prevailed.

The Court in *DiPierro* held that the Maine statute prevailed and judgment was rendered for the executrix. The Court's reasoning was based in part on an analysis of the congressional purpose in providing for survivorship accounts in federal credit unions. After a review of the Congressional Record, the Court concluded that:

> It would thus appear that Congress was not thinking in terms of superseding settled state law with reference to joint tenancies but, rather, in putting the various federal credit unions on a status equivalent to that of other competing financial institutions. *DiPierro*, 317 A.2d at 827.

A further indication that Congress did not intend to supersede state law is a provision in the Act which permits easy conversion of a federal to a state credit union, 12 U.S.C.A. § 1771. The credit union involved in this case could be easily and simply converted to a state credit union, and then back to a federal, and so on. It is unthinkable that Congress intended for the property rights of the members to radically change with each such conversion, yet this would be the result if state law is superseded in this case. Concerning this provision, the Court in *DiPierro* stated:

> It would be inconceivable that Congress would have intended to create a special type of joint tenancy and at the same time freely permit the conversion of a federal credit union to a state credit union where such a joint tenancy contravenes the laws of that state. Congress clearly indicated its intent by the enactment on October 19, 1970, of 12 U.S.C.A. § 1970 which states:

> "It is not the purpose of this subchapter to discriminate in any manner against state-chartered credit unions and in favor of federal credit unions, but it is the purpose of this subchapter to provide all credit unions with the same opportunity to obtain and enjoy the benefits of this subchapter."

DiPierro, 317 A.2d at 827.

It is clear that the purpose of the survivorship provision of the Federal Credit Union Act is not to supersede state law, but to place federal credit unions in a position of equality with local institutions. Therefore, local limitations on survivorship accounts must apply equally to the federal credit union accounts, or the very purpose of the provision and the Act will be defeated.

The Court in *DiPierro* concluded that state law concerning joint tenancy with right of survivorship prevails over the survivorship provision of the federal credit union Act:

> We thus conclude that the amendment to Section 1759 in 1946 was not intended to create a type of joint tenancy which would contravene state law but only to place various federal credit unions in a position of competitive equality with other banking institutions serving the same geographical area. *DiPierro*, 317 A.2d at 827.

The principal of equality is evident in other federal acts governing national financial institutions. The McFadden Act of 1927, 12 U.S.C.A. § 36, could be construed to authorize branch banking in the entire federal banking system. However this Court held in *First National Bank of Logan v. Walker Bank and Trust Company*, 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343

(1966), and reiterated in *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), that the purpose was not to supersede state law and permit branch banking in states where it was otherwise prohibited. The purpose was to place federal banks in a position of competitive equality with state banks, equally subject to state laws:

> The policy of competitive equality is therefore firmly imbedded in the statutes governing the national banking system. *First National Bank v. Dickinson*, 396 U.S. at 133.

This policy can only be served in this case if the community property law of Texas applies to federal as well as state-chartered credit unions.

As Petitioner recognizes (Petitioner's Application, p. 15), the test is not simply whether there is a conflict between the federal and state law, but whether the "full purposes and objectives of Congress" will be accomplished. *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). The full objectives of Congress in this case can only be served if Texas Community property law prevails.

The Texas Constitutional restriction against the creation of a joint tenancy with right of survivorship out of community funds applies equally to deposits in the federal credit union account and the Texas Supreme Court and Ninth Court of Civil Appeals correctly affirmed the judgment of the Probate Court which held that one-half of the funds in the Continental Emsco account were included in the estate of the deceased.

Respondent therefore urges that Petitioner's Application for a Writ of Certiorari be DENIED, or in the alternative the Judgment of the Texas Supreme Court be affirmed, and all costs assessed against Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been forwarded to the attorney of record, via certified mail, return receipt requested, this 2 day of September, 1977.

Stephen W. Hanks

STEPHEN W. HANKS